IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1397

JOSEPH JUDICE, individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

against

HARRY VAIL, JR., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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Opinions Below

1. The opinion of the District Court, convening the three-judge court. 387 F. Supp. 630 (S.D.N.Y. January 13, 1975) (101a).*

2. The opinion (and order) of the three-judge District Court declaring Sections 756, 757, 770, 772, 773, 774 and

* Numbers in parentheses refer to Appendix (a) or Appendix to Jurisdictional Statement (J.S. a).

775 of Article 19 of the New York Judiciary Law unconstitutional and enjoining their operation is reported below at 406 F. Supp. 951 (S.D.N.Y., January 7, 1976) (J.S. 1a).

3. The separate opinion (MacMahon, D.J.) granting class action status is unreported. It is reproduced in the Jurisdictional Statement (J.S. 17a).

4. Probable jurisdiction noted and *forma pauperis* relief granted appellees. —— U.S. ——, 44 U.S.L.W. 3737 (June 21, 1976).

Jurisdiction

Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253. The modified judgment or order appealed from was entered January 28, 1976 (J.S. 19a). The defendants appealing filed their notice of appeal February 6, 1976 (J.S. 21a).

Questions Presented

1. Did the District Court err in failing to abstain in view of the pendency of state court proceedings in which the substantive issues raised herein could have been resolved?

2. Was the District Court in error in ruling on the constitutionality of state statutes which were capable of a constitutional interpretation by the state court?

3. Did the District Court violate the constitutional requirements of "full faith and credit" and *res judicata* by invalidating state court orders rendered in proceeding between the private defendants below and appellees?

4. Are the several sections of New York's Judiciary Law at bar unconstitutional *on their face* because

(a) they allow an adjudication of contempt without an actual hearing (based on default in appearance of order to show cause).

(b) § 757 does not require specific notice of the possible results of non-appearance at the show cause hearing other than that the person served will be in contempt?

(c) §§ 756, 770, 772 and 774 do not require informing the alleged offender of his right to counsel (or assigned counsel if indigent)?

(d) the fine and alternatively incarceration permitted under §§ 756, 770, 773 and 774 are deemed punitive and is paid to the judgment-creditor?

5. Was this a proper class action?

6. Did the District Court err in granting partial summary judgment when the only motions before it were for a preliminary injunction and a cross motion to dismiss?

7. Did the District Court err in giving retroactive application to its order?

Statutes Involved

New York Judiciary Law, Article 19. The specific portions of Article 19 invalidated are set out in the Appendix to this brief.

Briefly summarized the statutes dealing with contempt arising from the failure to comply with an order of the court:

(1) § 756 provides that where the offender has failed to pay a specific sum of money an *ex parte* order may issue committing the person until the money is paid or he is discharged according to law. (This was provided for in the fining order issued here after the respondents failed to appear on the order to show cause.)

(2) § 757 provides for either an order to show cause or a warrant of attachment to bring the case before the (state) court. (The latter, subd. 2, would result in arrest before any adjudication. It was not used herein.)

(3) § 770 provides for a final order if the accused has committed the offense and must be punished by fine or imprisonment. (A special procedure is provided for Domestic Relations Law § 245 and other matrimonial orders for payment of alimony or counsel fees.)

(4) § 772 simply provides for decision of the order to show cause and punishment as in § 770.

(5) § 773 provides for a fine to indemnify the aggrieved party. If actual loss is not shown, a fine must be imposed not exceeding costs and expenses plus $250.

(6) § 774 provides a limit to imprisonment. For a fine of under $250, the limit is three months; if more, six months. There is also a provision that the offender must be brought before the court within 90 days, if imprisoned for an indeterminate term or for more than three months. Notice is provided.

(7) § 775 provides that where the offender cannot endure the punishment of imprisonment or pay the money or perform the act, the court may discharge the offender from custody.

Statement of the Case

The District Court ultimately granted partial summary judgment declaring seven cited sections of New York's Judiciary Law unconstitutional on their face on the basis of an allegedly "typical" case; that of the named plaintiff, Harry Vail. According to the District Court's statement of the facts which, in turn, was based solely on affidavits submitted by appellees and their attorney, submitted in support of their motion for a preliminary injunction,

Vail suffered a default judgment ($534.36) in the City Court of Poughkeepsie, Dutchess County, New York. He was then served with a subpoena by the attorney for the judgment-creditor to appear for a deposition relative to an examination of his assets which might be available to satisfy the judgment. Vail did not appear.*

Thereafter, on the basis of the default and in accordance with New York law, upon application of the attorney for the judgment-creditor, Vail was ordered to appear to show cause why he should not be punished for contempt for his failure to appear. Appellant Judge Juidice signed this order to show cause, which was served upon Vail.

When Vail disregarded this order and once again failed to appear in court, Judge Juidice signed another order imposing a fine ($250 plus $20 costs), payable to the judgment-creditor (Public Loan Company) in reduction of the judgment (although not reproduced the fining order was of the installment payment nature. CPLR [New York Civil Practice Law and Rules] 5226. See appendix to plaintiffs' brief in District Court).** In Vail's case this occurred. He was released the next day upon payment of the fine.

Plaintiffs also alleged indigency. (Obviously if any judgment-debtor is indigent the examination in supplementary proceedings would be non-productive to the judg-

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* The subpoena pursuant to N.Y. Civil Procedure Law and Rules (CPLR) 5223 must state that: "failure to comply with the subpoena is punishable as a contempt of court," must be served at least 10 days before its return date (CPLR 5224) and upon any examination if the person subpoenaed does not understand the English language that "the judgment-creditor shall, at his own expense, provide a translation of all questions and answers."

** The form of the order was different from the case of Patrick Ward, another appellee whose order of contempt was annexed to the original papers asking a temporary restraining order in the District Court. Those provided if the fine was not paid within 30 days, upon proof of due service, an order might issue *ex parte* directing the Sheriff to take Ward into custody. This was stayed (50a).

ment-creditor. Furthermore, if such fact is pointed out to the court, such debtors as appellees would be released from any civil imprisonment.) It should be noted that there were numerous other situations before the Court below, some of which did not involve even alleged indigency--i.e., the appellees could pay the fine.* Indeed, for the most part, they paid the fine.

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* Briefly, the contentions were and this is not to concede the absence of any factual issues, as the defendants-appellants were moving to dismiss and plaintiffs never established these allegations in state court to oppose contempt. Thus appellant Judges could have no basis to controvert these claims, although they have never been properly established in any evidentiary hearing in a court, state or federal.

(1) Patrick Ward owes a state court judgment of $146.84. He failed to appear at a subpoena examination, in response to an order to show cause, or pay a fine imposed. He was subject to commitment for his failure. (20a-24a)

(2) Richard McNair owes a judgment of $362.42. He failed to appear at a subpoena examination, respond to an order to show cause, or pay a fine ($293.75) imposed. He was jailed for five hours, paid the fine on money from "rent" and money his wife borrowed from her credit union. It is significant that the judgment was for services rendered to plaintiff McNair's wife. While he contends he is "indigent", he had the resources to pay the fine ["rent" money and borrowing], a substantial portion of the judgment. (Compl. ¶ 74, 28a)

Thereafter another plaintiff was added in this action:

(3) James Hurry owes a judgment of $90.43. He, too, ignored all supplementary proceedings to examine him as to his assets and the order to show cause to punish him for contempt. He ignored the fining order. Warned by the Sheriff that he would be committed January 2, 1975 he intervened in the instant action. While he claimed many debts, he did not claim indigency and contended (¶ 14, aff., Dec. 31, 1974) that he "refuses to pay the fine because he maintains that defendant Redl never properly repaired his car." Thus failure to pay was not because of any indigency.

Then four more plaintiffs were permitted to intervene or moved to do same in the action:

(4) Leslie Nameth owes a judgment of $69.82. His situation is quite similar to Hurry. He ignored all legal process

(footnote continued on following page)

The appellees are basically a class of judgment-debtors who have never presented any claims on the merits or on procedure to appellant judicial officers, yet were allowed to sue the latter for violation of their alleged constitutional rights.

(footnote continued from preceding page)

and notices. He, too, asserted that he "refused to pay the fine because he maintains that defendant Redl did not give him a proper credit on the towing charges . . ." (¶ 11, 56a). This failure to pay was not because of any indigency.

(5) McKinley Humes owes a judgment of $233.84. He, too, ignored all legal process and notices. He faced the *danger* of imprisonment. He had never appeared in state court. (58a-63a)

(6) Joanne Harvard owes a judgment of $413.40. She ignored all legal process and notices, was arrested and committed for non-payment, at which time she promptly paid the fine, allegedly through a "loan" from her mother. She asserted she has been threatened with commitment again. She asserts she has no money to make installment payments on her outstanding judgment. However, no legal proceedings in state court were ever instituted. (64a-68a)

(7) Joseph Rabasco was under a court order to make support and mortgage payments to his wife. He defaulted, allegedly after losing his job, and stated he was on unemployment insurance. His wife sought an order of contempt. Of all the plaintiffs below, Rabasco alone appeared in court on the hearing. He allegedly asked Justice Grady, presiding there, to assign a lawyer. While it was asserted Justice Grady "refused", the Justice did adjourn the case from January 6, 1975 to an unspecified date so that Mr. Rabasco could retain a lawyer. It was stated private counsel wanted a $500 to $1,200 retainer. Mr. Rabasco did retain Mid-Hudson Valley Legal Services as his attorney. Within two days it had drawn up the affidavit for this action. Thus to claim Mr. Rabasco was refused counsel is absurd. His hearing was adjourned and he retained an attorney.

(8) Richard Russell owes a judgment of $932.11 on a lease he broke. The usual defaults occurred. On January 30, 1975, pursuant to a commitment order of *March 8, 1974*, he was arrested and committed for non-payment of his fine. The *same day*, he paid his fine ($289.95 allegedly on money his father lent him). (69a-78a)

(footnote continued on following page)

Prior Proceedings

On institution of the action and thereafter, the appellees obtained temporary restraining orders in the district court enforceable against the appellant Judges against the commitment of appellees to jail based on the state court orders of contempt, thereby circumventing the state court proceedings. District Judge Cannella ordered the convening of a three-judge court, 387 F. Supp. 630 (S.D.N.Y. 1975).

The three-judge court, after hearing the motion for a preliminary injunction and the state defendants' motion to dismiss, declared the several sections of New York Judiciary Law unconstitutional and enjoined further application. In a separate memorandum and order District Judge MacMahon granted class action status (J.S. 17a). On appellants' order to show cause to resettle the order and for a stay (166a), the court changed the order, making the declaration of unconstitutionality retroactive and stating that the order was for "partial summary judgment", and failing to accord a stay to the appellants (J.S. 19a).

Appellants then applied to Mr. Justice Thurgood Marshall for a stay of judgment pending an appeal. Justice Marshall granted the stay on February 12, 1976 (J.S. 23a).

(footnote continued from preceding page)

(9) Helen Thorpe owed a judgment of $112.75 to Redl, an auto shop. The usual defaults occurred. She was arrested and committed, for *three hours*, when her nephew allegedly loaned her $139.63 and her fine was paid. (137a-140a)

(10) Robert H. Harrel and his wife Evella owes a judgment for medical services. While Mr. Harrel is purportedly to have intervened, there was no indication he has ever retained the attorneys herein. He had left home before the motion for intervention. While he was committed two times, for a total of *six hours*, each time his mother, brother or sister lent him the money to pay the fine and he was immediately released. As Mrs. Harrel did not know his whereabouts, we doubt if this was a real case or controversy. (141a-147a)

It should be noted that contradictory affidavits were filed as to Russell, Thorpe, and Harrel (79a-82a) and Harvard (82a-100a)

An application by appellees for modification of the stay was denied by Justice Marshall March 1, 1976.

The appellants filed their notice of appeal February 6, 1976 (J.S. 21a), docketed the appeal with this Court by filing a Jurisdictional Statement April 2, 1976, and probable jurisdiction was noted by this Court June 21, 1976.

Summary of Argument

1. The District Court, in declaring the several sections of the New York Judiciary Law unconstitutional *on their face*, failed to observe applicable principles of equity, comity and federalism. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). The administration of the contempt power is at the heart of the operation of a judicial system. To abolish civil contempt in New York was a flagrant usurpation of power by the court below. State court orders cannot be reviewed by the district court in the guise of a civil rights action.

In the alternative the Court violated the U.S. Constitution, Art. 4, § 1 ("full faith and credit") and failed to give res judicata effect to completed contempt proceedings in state court. *Mertes* v. *Mertes*, 350 F.Supp. 472, affd. 411 U.S. 961 (1973).

The District Court's conclusion that New York law was clear also is subject to some question. *Walker* v. *Walker*, 51 AD 2d 1029, 381 N.Y.S. 2d 310 (2d Dept. 1976). Procedures or safeguards on imposition of civil contempt punishment are in a state of flux with significant decisions not considered below and the state courts, basically the appellants herein, should be accorded the opportunity to interpret or apply their own laws. *England* v. *Louisiana State Board*, 375 U.S. 411 (1964); *Carey* v. *Sugar*, —— U.S. ——, 47 L. Ed. 2d 587 (1976).

2. New York's civil contempt procedure is constitutional. It gives the respondent in a contempt proceeding adequate notice of the charge, an opportunity to be heard through counsel and grants a judge the power within his discretion to impose a sanction for the offense, if proven. *In re Oliver,* 333 U.S. 257 (1948); *Agur* v. *Wilson,* 498 F. 2d 961 (2d Cir. 1974), *cert. denied* 419 U.S. 1072.

It does not state a cause of action to claim defendants deprived plaintiffs of their civil rights by instituting contempt proceedings in state court.

Even if the facts uniformly supported the District Court's order, New York's Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 are not unconstitutional on their face. It is not a violation of due process that a statute permits, but does not require, (1) adjudication of contempt upon default without an actual hearing, *Blackmer* v. *United States,* 284 U.S. 421 (1932), (2) fails to warn of fine or imprisonment as a punishment for civil contempt (3) does not provide specifically for assigned counsel for indigents, and (4) allows fines payable to the judgment-creditor without proof of actual damages.

3. It was not proper to grant class action relief to invalidate a law which applies to all civil contempts. The court below made utterly no distinction between indigents, persons with resources to pay the fines, those represented by counsel, and those who actually had contempt hearings.

4. The granting of partial summary judgment without a trial was tantamount to final relief herein. The District Court erred in this regard. It violated the law of its own Circuit. *Rhoads* v. *McFerran,* 517 F.2d 66 (2d Cir. 1975).

POINT I

The district court erred in not abstaining, both because of the existing state court proceeding and the unsettled nature of the state law. It also failed to give full faith and credit and res judicata effect to state court orders.

A. The district court overreached itself in passing judgment upon the several state court proceedings

The adjudication of civil contempts is a judicial function. If the contempt is committed in the state courts of New York, then it is for those courts to adjudicate *whether* a person is in contempt and whether any constitutional rights have been violated or what safeguards must be observed, subject to review by this Court. The appellants herein are state court judges who have been held to have violated appellee's "constitutional" rights because of their judicial decisions. Yet appellants, too, have sworn to uphold the Constitution, Art. VI § 2 and are as capable of protecting appellee's constitutional rights as federal judges. They certainly did not deny the defaulting respondents in their courts any constitutional rights. Indeed it is generally difficult to give any rights to someone who fails to appear, save the court assuring itself that there is jurisdiction over the defaulting party.

The very concept of a federal court assuming jurisdiction over state court judges and litigants to review state court orders strikes at the heart of the fundamental principles of equity, comity and federalism which underly our dual system of courts, i.e., state and federal. Even though 42 U.S.C. § 1983 may be an exception to the anti-injunction provisions of 28 U.S.C. § 2283, *Mitchum* v. *Foster,* 407 U.S. 225 (1972), a court must still always consider applicable principles of equity, federalism and comity, *Mitchum, id.* at 243-244 (Burger, C.J., conc.).

What due process attaches to a "civil" contempt proceeding is not a determination easy to make, as "civil" contempt is not easy to classify. The sanctions for such contempt are said to be coercive in nature; *United States* v. *United Mine Workers*, 330 U.S. 258, 303-04 (1947). This is in contradistinction to criminal contempt where the sanction is said to be "punitive", *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); see also *Katz* v. *Murtagh*, 28 N.Y. 2d 234, 239, 269 N.E. 2d 816, 818-19 (1971). Still the distinction of contempt by the "character and purpose", *Gompers, id.* at 441 of punishment has not always been successful, as this Court noted in *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324 (1904) at 329:

> "[i]t may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both".

And at 326, this Court clearly stated:

> "A contempt proceeding is *sui generis*. *It is criminal in its nature*, in that the party is charged with doing something forbidden, and, if found guilty is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action" (Emphasis supplied).

Regardless of whether "civil" contempt is civil or criminal for abstention pursuant to *Younger* v. *Harris*, 401 U.S. 37 (1971) or *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), the court below utterly failed to consider the setting of the process it enjoined. Contempt is a judicial process, instituted in a court, heard by a court and decided by a court. By preventing the appellants (and all state court judges) from performing their judicial functions, the district court failed to give proper weight to relevant considerations of federalism.

As said in *Huffman*, at 603-604:

> "Although Mr. Justice Holmes was confronted with a bill seeking an injunction against state executive officers, rather than against state judicial proceedings, we think that the relevant considerations of federalism are of no less weight in the latter setting. If anything, they counsel more heavily toward federal restraint, since interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principle.' *Cf. Steffel* v. *Thompson, supra*, at 462."

Simplistic labeling of contempts as civil or criminal, as in the opinion below (n. 14), is not helpful. While instituted by a private litigant, civil contempt in New York has been defined or called quasi-criminal or semi-criminal. *Matter of Carlson* v. *Podeyn*, 12 A D 2d 810, 209 N.Y.S. 2d 852 (2d Dept. 1961); *Dwyer* v. *Town of Oyster Bay*, 28 Misc 2d 952, 217 N.Y.S. 2d 392 (Sup. Ct., Nassau Co., 1961) ("semi-criminal"). In other jurisdictions, even though the contempt is noted as quasi-criminal as it may result in fine or imprisonment, but this has not been held to alter its remedial character. *Cromaglass Corp.* v. *Ferm*, 500 F.2d 601 (3d Cir. 1974); *United States Steel Corp.* v. *United Mine Workers*, 393 F. Supp. 942 (W.D. Pa. 1975).

It is clear that even if a commitment involved here is denominated in law as civil or quasi-criminal, the principles enunciated in *Huffman* v. *Pursue, Ltd.*, should be applied here. See *Schmidt* v. *Lessard*, 421 U.S. 957 (1975), vacating and remanding *Lessard* v. *Schmidt*, 379 F. Supp. 1376 (E.D. Wisc. 1974).

The result reached below cannot be said to be induced by any arbitrary state court action. As a class the appellees never appeared in the state court before appellant judges, although served with notice in the order to show cause, to appear in the state court to explain why the appellees should not be punished for contempt. If appellees had wished to present any excuse or explanation for their failure to comply with the subpoena, see n. 8 to Opin. below (J.S. 15a) the hearing on the order to show cause was the place to do it as it was a matter of defense. Certainly the collateral attack in federal court was not warranted.

It was a flagrant breach of federalism to have held that state court judges violated the constitutional rights of appellees and all other respondents in New York civil contempt proceedings, past and present, who had never appeared in court. As stated in *Rizzo* v. *Goode,* —— U.S. ——, 46 L. Ed. 2d 561, 574-575 (1976), principles of federalism (and abstention) have not been limited to criminal proceedings, or even to the judicial branch of state government:

> "Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal prosecution itself."

There this court applied the principles to an executive branch of an agency of local government, namely the Philadelphia Police Department. There should be displayed more reluctance to interfere with ongoing state court proceedings particularly here where, as we have said, it was not the action of the state court judges which denied appellees any constitutional rights as the judges never

were presented with such objection. Action which these judges might have taken on an application by appellees, would be in their capacity as judges, who have the same constitutional obligations as the three-judge court below. See *Gras* v. *Stevens,* —— F. Supp. ——, (3 judge court, S.D.N.Y. 76 Civ. 9, May 10, 1976); *Mendez* v. *Heller,* 380 F. Supp. 985 (E.D.N.Y. 1974), affd. *sub nom. Roman* v. *Heller,* —— F. 2d —— (2d Cir. 1976) Slip op. 1841. Simply by signing an order to show cause, or the subsequent fining and commitment order, it can hardly be said these appellants deprived appellees of due process. If the judges committed error, the remedy was to appeal the order through the state court system to this Court. Federal courts do not sit to pass on the correctness of state court orders in these instances. *Murray* v. *Oswald,* 333 F. Supp. 490, 492 (S.D.N.Y. 1971).

Gerstein v. *Pugh,* 420 U.S. 103, 108, n. 9 (1975), does not warrant the invasion of the state judicial proceedings. There the injunction issued was not directed at the state prosecution* or court proceeding as such but to the legality of pretrial detention without a judicial hearing, while the injunction herein is directed at the whole civil contempt process in New York. The order below does not simply direct that a hearing be held but rather, in practical effect, enjoins the whole statute.** Furthermore, the Florida procedure found objectionable in *Gerstein* eliminated any *opportunity* for a hearing. *Id.,* at 116. The detention was

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* The case was before a single federal judge because no state statute was involved. 355 F. Supp. 1286 (S.D. Fla. 1973), aff. & vac. in pt. 483 F. 2d 778 (5th Cir. 1973).

** This is demonstrated by *Darbonne* v. *Darbonne,* 85 Misc 2d 267, 379 N.Y.S. 2d 350 (Sup. Ct. Kings Co., 1976), decided after the decision herein but before the stay of judgment granted by this Court. Despite the deleterious effects, *id.,* at 270, the court simply would no longer enforce by contempt proceedings a husband's obligation to pay an allowance ordered by the court in a matrimonial action. This obtains whether counsel is present or not whether or not the husband has the ability to comply.

effectuated by the prosecutor's action, not a judge. Thus the federal court was not reviewing a state court order.

The appellees could not ignore state court orders and bypass orderly judicial review in the state court by the institution of the district court action here. *Walker* v. *City of Birmingham,* 388 U.S. 307, 319 (1967); *Maness* v. *Meyers,* 419 U.S. 449, 458 (1975).

B. "Full faith and credit" and *res judicata*

The order appealed from also violates the "full faith and credit" clause of the United States Constitution, Art. 4, § 1. *Franklin National Bank* v. *Krakow,* 295 F. Supp. 910, 916 (D.D.C. 1969) citing *Huron Holding Corp.* v. *Lincoln Mine Operating Co.,* 312 U.S. 183 (1941) and *Davis* v. *Davis,* 305 U.S. 32 (1938). It has failed to give same to state court orders. Moreover, the instant action was an unjustified interference with the duty of state courts to enforce their judgments, *Porto Rico* v. *Rosaly y Castillo,* 227 U.S. 270 (1913). It was calculated to deprive such courts of their authority to enforce such judgments, *Central National Bank* v. *Stevens,* 169 U.S. 432, 464, 465 (1898), such as the failure to testify in supplementary proceedings. *Cf. Bevan* v. *Krieger,* 289 U.S. 459 (1933). There this Court upheld commitment of a witness by a notary, not a judicial officer, who refused to testify at a deposition. As the witness, at 465, refused to answer questions,* the "attitude indicates no desire for a hearing upon the propriety of the questions, but on its face constitutes a contempt". The petitioner requested no consideration of his rights by the notary, was denied no hearing by that officer and thus was not denied due process.

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* At no point, have the appellees, certainly Vail, indicated any willingness to respond or answer the subpoenas herein in supplementary proceeding.

If there is any constitutional defect in the order of the state court, the remedy was to appeal, *Huffman, id.* at 605 with this Court as the ultimate remedy or avenue of appeal.

Certainly the decision below took an unduly narrow view of *Huffman.* See *Anonymous* v. *Association of the Bar,* 515 F. 2d 427, 432, n. 2 (2d Cir. 1975) cert. den. —— U.S. ——. Principles of federalism and comity are not to be discarded simply "by calling the state proceeding civil".

It should also be added that besides comity, the principle of *res judicata* has application to the appellees' institution of suit in the federal court. *Mertes* v. *Mertes,* 350 F. Supp. 472 (D. Del. 1972), affd. 411 U.S. 961 (1973); *Godoy* v. *Gullotta,* 406 F. Supp. 692, 693 (S.D.N.Y. 1975) which states:

> "*Mertes* . . . makes clear that the mere fact that a state court has not considered a constitutional defense will not prevent its judgment from being a bar to a subsequent federal action under the Civil Rights Act".

In the instant case contempt was adjudicated against appellees on the merits. The appellees could not relitigate contempt in the federal courts or raise constitutional objections thereto.

It is patent that in every respect, the district court was attempting with one fell swoop to rewrite the established law dealing with procedures supplementary to judgment without any record to support its strictures. *Cf. Lindsey* v. *Normet,* 405 U.S. 56, 74 (1972), against "federalizing" the law of landlord and tenant.*

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* *Lindsey* might appear to support rejection of abstention, *id.* at 62, n. 5. However this Court carefully noted, at 59, ". . . before statutory eviction procedures were begun in the Oregon courts, appellants filed suit in federal district court . . ." This hardly fits the facts of the instant case.

POINT II

The complaint presented no substantial federal question. The statutes at issue provide reasonable notice, an opportunity to be heard, the right to counsel, and punishment in the discretion of the court.

Both at first blush and upon detailed analysis of the reasons given by the District Court it is patent that appellees never raised a substantial federal question in their complaint.

Despite the numerous constitutional objections the district court found, the declaration of facial unconstitutionality of Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 was erroneous. It is hard to conceive that the seven sections are always used in bad faith or to harass or are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it". *Huffman, supra* quoting *Younger* v. *Harris,* 401 U.S. at 53-54 and *Watson* v. *Buck,* 313 U.S. 387, 402 (1941).

New York's statutes on their face provide notice and a hearing and this was, of necessity, recognized in the opinion below (J.S. 7a).• The Judiciary Law provides what is basic to our jurisprudence, "(a) person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . .". *In Re Oliver,* 333 U.S. 257, 273 (1948).

Contrary to the district court, the Court of Appeals in its own Circuit has upheld the basic constitutionality of the contempt procedure and statutes in New York. Indeed that court held that no substantial constitutional question was

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• "It is clear that the challenged sections of the Judiciary Law provide an opportunity for a hearing at the time the show cause order is made returnable".

presented, thus not requiring a three-judge court. *Agur* v. *Wilson,* 498 F. 2d 961, 967 (2d Cir. 1974), *cert. den.* 419 U.S. 1072, *reh. den.* 420 U.S. 939. The statutes are simply procedural and evocative of the power of a court to punish a contempt. *On their face,* these statutes provide for *due process, In Re Oliver, supra, Agur, supra.*

As in *Agur, supra,* at 967, no one can doubt that every appellee was given the opportunity for a hearing. No valid excuse has been given for non-participation. Certainly there is no reason to suppose that one has a right *not* to obey a court order on the assertion in another court, that appellants would not observe their constitutional rights.

It is absurd to hold all these statutes unconstitutional on their face, when *Agur* specifically upheld Judiciary Law §§ 770, 772 and 774(1). At least in *Agur* the complaint was pleaded with some specificity. In the instant case, the court states Vail as "typical" and on this basis wipes out the law below. *Agur* demonstrates the law is perfectly constitutional on its face.

And it is not certain that New York law is as clear as the Court below thought (J.S. 4a). While the challenged statutes, Judiciary Law, Art. 19 (§§ 753 *et seq.*) were originally enacted in 1909 (J.S. 5a), their application to enforcement of money judgments via disclosure subpoenas is relatively recent. It dates from 1963 and the enactment of the Civil Practice Law and Rules; CPLR 5251. The application or what is permissible has never been interpreted by the courts of New York *in light of* the constitutional issues herein. *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 420 (1964).•

• Other state law defenses may be involved and presented in state court such as being told one did not have to appear in court (n. 8 to opin. below) (J.S. 15a).

As will be shown *infra,* New York procedure on contempts of the nature involved here is not uniform. Certainly the procedure

(footnote continued on following page)

It should be noted that the private defendants herein (not appealing), did not deprive appellees of their constitutional rights by seeking contempt citations in state court. It may be true that "to act 'under color' of law does not require the accused to be an officer of the state", and "it is enough that he is a willful participant in joint activity with the State or its agents." *United States* v. *Price,* 383 U.S. 787, 794 (1966), quoted and relied upon in *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 155 (1970). Yet there is no authority that a private person, by asking a state court to make an award against another which is claimed to be unconstitutional is violating 42 U.S.C. § 1983. To the contrary, the Court of Appeals in the very Circuit as the court below has squarely held that "merely by holding its courts open to litigation of complaints [a state] does not clothe persons who use its judicial process with the authority of the state in the sense [required by § 1343];" *Stevens* v. *Frick,* 372 F. 2d 378, 381 (2d Cir. 1967), *cert. den.* 387 U.S. 920 (1967); see also *Henry* v. *First National Bank of Clarksdale,* 444 F. 2d 1300, 1309-10 (5th Cir. 1971), *cert. den.* 405 U.S. 1019 (1972).

A. That a statute permits adjudication of contempt without an actual hearing is not unconstitutional on its face

Besides the still valid holding that due process does not require additional notice to a judgment debtor who had had his day in court before judgment was rendered, *Endicott Johnson Corp.* v. *Encyclopedia Press, Inc.,* 266 U.S. 285

(*footnote continued from preceding page*)

in Dutchess County is not the pattern for the entire state. Abstention to obtain a state interpretation of the contempt hearing procedure was suggested to the district court. As in *Carey* v. *Sugar,* —— U.S. ——, 47 L. Ed. 2d 587 (1976), it is entirely possible the New York courts could construe the Judiciary Law in a manner to obviate any of the constitutional problems envisaged below. Already one state appellate court, has commented on the decision below, and in a manner rendering any constitutional decision unnecessary. *Walker* v. *Walker,* 51 A D 2d 1029, 1030, 381 N.Y.S. 2d 310 (2d Dept. 1976).

(1924), the law also is clear that due process does not require the actual presence of the alleged offender in a contempt proceeding. If the notice served is sufficient to inform him of the character of the charge against him and of the hearing at which he would have an opportunity to present his defense, due process is provided. *Blackmer* v. *United States,* 284 U.S. 421, 443 (1932). In that case the petitioner, a contemnor, failed to answer a subpoena and objected to the procedure in enforcing contempt under the federal Walsh Act, then 28 U.S.C. §§ 711-718 (284 U.S. at 433). The issue of presence and notice was squarely presented. *Id.* at 436 (objections 3 and 4 below). In reply this Court stated, *id.* at 442-443:

> "It was sufficient that the subpoenas required his attendance to testify on behalf of the United States at the time and place stated. Equally unavailing is the objection that after the petitioner had refused to appear in response to the subpoenas, the orders to show cause why he should not be punished for contempt did not specify the offense. As the statute prescribed, he had been served with the subpoenas, and had defaulted and he had also been served with the order which directed him to show cause why he should not be adjudged guilty of contempt and provided for the seizure of his property to be held to satisfy any judgment that might be rendered against him in the proceeding. The notice which he thus received was sufficient to inform him of the character of the charge against him and of the hearing at which he would have opportunity to present his defense."

See also *In Re Oliver, supra.*

Reliance by the opinion below (J.S. 15a, n. 18) on *McNeil* v. *Director, Patuxent Institution,* 407 U.S. 245, 251 (1972) and *Harris* v. *United States,* 382 U.S. 162, 167 (1965) is wide of the mark. Both cases involve incarcera-

tion without an opportunity for a hearing. Thus in *McNeil*, the State of Maryland claimed the power to confine petitioner indefinitely without ever obtaining a judicial determination (249). The Court held (251) a hearing was required to determine whether petitioner was in "contempt". Similarly *Harris*, where the judge punished summarily a contempt committed out of his presence. In both cases the petitioners were present but there was no hearing. On the other hand, there has been a "hearing" in every case of appellees on the order to show cause. If appellees wished to controvert any facts or the affidavits then they must appear for the hearing, not default. In sum they deprived themselves of a hearing.

Having been fined by order properly served, apparently the appellees argued and the court below agreed that another hearing was necessary before commitment issue (J.S. 7a). Yet the fining order provides for personal service and notice. If appellees wished to contest their contempt* they could still move to vacate (CPLR 5015) and seek a stay or temporary restraining order on the fine and commitment. *Cf. Brumfield* v. *Tofany*, 31 N Y 2d 928, 293 N.E. 2d 92 (1972). The requirement of an *actual* hearing carried to its logical extreme would require the state court to *ex parte* issue a warrant to arrest and bring into court every person simply accused of civil contempt.** If the alternative were mandated, thousands of alleged offenders would be arrested to insure their presence in court.

In point of fact in the Civil Court of the City of New York, where perhaps more supplementary proceeding con-

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* It does not appear, even now, that any appellee is willing to obey the original subpoena and submit to examination as to assets, etc.

** This procedure is allowed as an alternative procedure under Judiciary Law § 757(2), which in its sweeping opinion, the district court also declared unconstitutional. *Cf. Blouin* v. *Dembitz*, 367 F. Supp. 415, 420 (S.D.N.Y. 1973), aff'd. on other grounds (abstention), 489 F. 2d 488 (2d Cir. 1974).

tempts are instituted, the result of a default on an order to show cause [Judiciary Law § 757(1)] is an order denominated a "bailable attachment" directing the Sheriff to produce the respondent in court. This is under §§ 757(2), 762 and bailable in a sum set by the judge, § 764. Indeed the Civil Court has a whole set of rules for enforcement of money judgments and contempts. 22 NYCRR (Codes, Rules & Regulations, State of New York) §§ 2900.27, 28.*

As an example of the procedure in the Civil Court, see *Sure Fire Fuel Corp.* v. *Martinez*, 75 Misc 2d 714, 348 N.Y.S. 2d 502 (Civil Ct., N.Y. Co., 1973). Even in default "this court should not issue a finding order with a provision for commitment without first bringing the debtor before the court" (716). Yet the court in *Sure Fire* was applying the same statutes declared to be unconstitutional *on their face* by the district court. See also *Uni-Serv Corp.* v. *Batys*, 62 Misc 2d 860, 311 N.Y.S. 2d 456, and *Linker*, 62 Misc 2d 861, 311 N.Y.S. 2d 726 (Civil Ct., N.Y. Co., 1970). Actually, at most, the courts of Dutchess County were unconstitutionally *applying* the Judiciary Law. The prophylactic for that though is an appeal to a higher state court, not an independent action in federal court.

An interpretation of Judiciary Law § 757 to obviate any constitutional problems would require a court to first follow § 757(1) and then if there was no appearance, proceed under § 757(2). *Sonn* v. *Kenny*, 63 Misc. 251, 116 N.Y.S. 613 (Sup. Ct., App. T. 1909); *Matter of Nejez*, 54 Misc. 38, 40, 41, 104 N.Y.S. 505 (City Ct. N.Y. 1907),** ("There is nothing . . . which required the court upon a default and without hearing the accused to determine that he has committed contempt of court.") see also *Mahoney* v. *Sutphin*, 164 App. Div. 794, 150 N.Y.S. 206 (2d Dept., 1914).

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* The standard form of "order imposing fine" on Vail included issuance of a warrant and bringing Vail before the court, but was crossed out. Query: Was this proper?

** *Nejez* describes the practice of issuing bailable attachments in the City Court, the predecessor of the Civil Court.

Since the courts in the State of New York do, in most instances, follow a procedure constitutional even in the view of the district court, the order below should be vacated with directions to the district court to abstain so that the state court can interpret its own law. *Cf. Carey* v. *Sugar, supra.*

Is is not a violation of due process to allow a judge to exercise discretion. It cannot be assumed that a judge will not act to preserve constitutional rights. *Cf. Cedar Rapids Eng. Co.* v. *Haenelt,* 39 A D 2d 275, 277, 333 N.Y.S. 2d 953 (2d Dept. 1972), app. dsmd. 31 N Y 2d 780, 291 N.E. 2d 387.

Citation of *Desmond* v. *Hachey,* 315 F. Supp. 328 (D. Me. 1970) (J.S. 15a, n. 9) is inapposite. The statute in *Desmond* made no provision for the issuance of an order to show cause, returnable before a judge, where the judgment debtor could explain his default. See *Desmond, id.* at 332. New York procedure clearly "provides an opportunity . . . prior to incarceration, why he failed to obey the subpoena . . .", *id.* at 333. As with *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), the process was non-judicial. Where a judge controls the process and a hearing is scheduled, due process is satisfied. *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974).

The whole question of due process and procedure on default in a contempt is discretionary. See *Matter of Hildreth* (*Storm*), 28 AD 2d 290, 284 N.Y.S. 2d 755 (1st Dept. 1967). As stated there the power to punish a person for civil contempt for failing to pay money is discretionary. It "is to be exercised in the light of facts and circumstances in each particular case. The petitioner establishing a refusal to pay the sum of money directed to be paid is not generally entitled as a matter of law to an order committing the respondent for contempt." (Citing cases). Also the nature and extent of punishment is an exercise of the court's discretion. *Id.* at 293 citing 21 Carmody-Wait, New York Practice, § 157, p. 310.

B. That a statute fails to specifically provide or recite that a failure to respond to a subpoena may result in imprisonment is not unconstitutional on its face

At the outset it must be noted that none of the statutes involved specify the form of notice or the wording of the order to show cause. The statute does provide for language in the show cause order why the person served should not be "punished for the alleged offense" (§ 757, subd. 1). The statute on its face does not prohibit notice of the penalty or the consequences of not appearing in response to the order to show cause. But the type of notice specifying the time and place for the hearing and the offense charged to be personally served fully satisfy due process. *Cf. Blackmer* v. *United States, supra,* 284 U.S. 421. It is only when the person served is under some special disability that due process might require better notice. *Covey* v. *Town of Somers,* 351 U.S. 141, 146-147 (1956). The district court imported as a due process requirement that the order to show cause *must* include notice of penalty and that the failure to mandate such notice was fatal to the statute. The district court simply interposed its own personal view as to the due process requirement without any factual evidence to support such imposition.*

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* The district court requirement has been part of the Rules of Practice of the Civil Court of the City of New York, *supra,* for many years in the issuance of the original subpoena (at least Sept. 30, 1973). 22 NYCRR § 2900.27(f) *supra.* To quote:

"(f) Every subpoena or other process providing for the examination of a judgment debtor or other person, including a garnishee, in addition to the other requirements of CPLR 5223, shall have endorsed on its face, in bold type, the words: 'This subpoena or process (as the case may be) requires your personal appearance at the time and place specified. Failure to appear may subject you to fine and imprisonment for contempt of court' ".

(footnote continued on following page)

Certainly the cases the court below relied on fail to support any requirement of a "warning" on a subpoena as to fine or imprisonment. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (n. 20, 16a) deals with notice of service by publication, not the contents of the notice. The contempt proceedings herein were brought on by personal service of an order to show cause. The case of *Lynch* v. *Baxley*, 386 F.Supp. 378, 388 (M.D. Ala. 1974) involves persons alleged to be under a mental disability.* The instant case obviously involves persons of sound mind who are capable of understanding the meaning of "contempt".

C. That a statute fails to specifically provide a right to counsel, and assigned if indigent is not unconstitutional on its face

There is no question that appellees could have appeared by counsel at the hearing on contempt in state court if they so chose. Indeed there is no claim that appellants were deprived of the *right* to have counsel. All *Cooke* v. *United States*, 267 U.S. 517 (1925), *cf.* opin. below (J.S. 16a, n. 23) requires is "the right to be represented by counsel". This is explained in *In Re Oliver*, *supra*, 333 U.S. at 275. No mention is made of assigned or free counsel for indigents.

Yet, although the court below does not clearly say so, its opinion appears to mandate that the alleged offender must have counsel assigned if indigent. The statutes do

(footnote continued from preceding page)

Obviously the "unconstitutional" statutes herein were constitutional in New York City.

* To this extent *Lynch* is similar to *Covey*, *supra*. Furthermore *Lynch*, apparently unappealed, cites *Lessard* v. *Schmidt*, *supra*. *Lynch* clearly would be subject to abstention, *Huffman* v. *Pursue*, *Ltd.*, on authority of *Schmidt* v. *Lessard*, *supra*, 421 U.S. 957.

not deny appellees the assistance of counsel upon request and the question is open. See *Walker* v. *Walker*, *supra*, 51 AD 2d 1029. (Curiously, the court below engaged here in the illogical process of treating the civil contempt process as criminal, while in discussing abstention is treated the state proceeding as civil.)

It should be noted that right to assigned counsel is discussed in *Abbit* v. *Bernier*, 387 F. Supp. 57, 62, n. 12 (on 63) (D. Conn. 1974), and relied on by the court below (J.S. 16a, n. 23). But all the *Abbit* court stated was that:

> "Although a contempt proceeding may also result in imprisonment, a right to counsel is unrecognized largely because these possible intricacies [factual and legal issues of potential complexity] are missing. While a § 52-369 hearing on ability to pay would attempt to weigh the validity of reasons for not complying with a court order, a civil contempt proceeding inquires no further than the presence or absence of compliance."*

Certainly there may be cases where counsel should be assigned but this should be left to the discretion of the state trial judge. It is not an inflexible due process requirement. *Duval* v. *Duval*, 114 N.H. 422, 322 A. 2d 1, 3-4 (1974). As in much of due process, flexibility is the keynote. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 788-791 (1973); *Middendorf* v. *Henry*, —— U.S. ——, 47 L. Ed. 2d 556, 566 (1976).

Still whether appellees were entitled to assigned counsel in state contempt proceedings is hypothetical. It was

* *Abbit* v. *Bernier*, *supra* (D. Conn. 1974) also is entirely different. It involves a clear case of imprisonment for debt (failure to pay a tort judgment) not disobedience of a court order, and subsequent contempt. Contrary to Connecticut procedure, New York expressly provides for a preincarceration hearing on the failure to appear for examination.

never established that the appellees were, in fact, indigent. Since the appellees did not appear in response to the order to show cause the subject obviously never arose. *Cf. Argersinger* v. *Hamlin*, 407 U.S. 25, 26 (1972).**

On the other hand, where a person is faced with civil contempt for failure to pay support, an appeals court in New York has ruled that he is to be advised of his right to counsel and have it assigned if indigent. *Rudd* v. *Rudd*, 45 A D 2d 22, 356 N.Y.S. 2d 136 (4th Dept. 1974). See also *Walker* v. *Walker*, *supra*. On right to counsel, *if requested*, see generally *Annotation: Right to Counsel in Contempt Proceedings*, 52 ALR 3d 1002.

D. That a statute, in part, permits a fine of up to $250 without showing actual loss or injury is not unconstitutional on its face (Judiciary Law § 773)

The court below held that the fine of $250 payable to the judgment-creditor for his damages for the non-appearance was violative of due process. This only involves Judiciary Law § 773, which permits such a fine not in excess of $250 in the absence of any other proof of damage.

The first sentence of § 773 in mandating fine "sufficient to indemnify the aggrieved party" is perfectly constitutional and in accord even with the district court's view of "actual loss" (J.S. 8a). Inexplicably though the whole statute is declared unconstitutional.

In any event, the $250 fine later mentioned is the maximum, *Stewart* v. *Smith*, 186 App. Div. 755, 175 N.Y.S. 468 (1st Dept. 1919); *Stark* v. *Kessler*, 277 App. Div. 1122, 100 N.Y.S. 2d 872 (2nd Dept. 1950). The maximum is not so disproportionate to the contempt as to be condemned on due process grounds. *Sunbeam Corp.* v. *Golden Rule Ap-*

** In the affidavit of Thomas A. Reed (¶ 4[b], 80a) it is averred appellee Russell was represented by counsel, the same as in the instant action.

pliance Co., 252 F. 2d 467, 470 (2d Cir. 1958). The payment of the fine to the judgment-creditor is in accord with the authorities. *United States* v. *Mine Workers*, 330 U.S. 258, 304 (1947); *Gompers* v. *Bucks Stove & Range Co.*, *supra*, 221 U.S. at 441 (1911); *Atlas Corp.* v. *DeVilliers*, 447 F. 2d 799, 803 (10th Cir., 1971), *cert. den.* 405 U.S. 933, *reh. den.* 405 U.S. 1033. Furthermore, the fine or "punishment" is based on a specific finding that besides committing the offense charged "that said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment-creditor." (Judiciary Law § 770). Damages, even if denominated a "fine" are warranted even if no "actual loss or injury has been sustained" (§ 773). By way of analogy, a federal civil rights action, under 42 U.S.C. § 1983 as the instant case, absence of actual damages does not defeat the action. *Sexton* v. *Gibbs*, 327 F. Supp. 134, 142 (N.D. Tex. 1970), affd. 446 F. 2d 904 (5th Cir. 1971), *cert. den.* 404 U.S. 1062 (1972). Even in absence of actual damages, federal law permits recovery of punitive damages. *Spence* v. *Staras*, 507 F. 2d 554, 558 (7th Cir. 1974). Thus how can it be said the New York statute violated constitutional rights by imposing a "punitive" fine payable to the judgment-creditor.

In addition, the holding below mandating the necessity of a hearing as to the imposition of penalty even upon non-appearance in response to the order to show cause appears to be at odds with this Court's recent decision in *National Coal Operators' Ass'n.* v. *Kleppe*, —— U.S. ——, 46 L. Ed. 2d 580. There this Court said (*id.* at 587-588) that any requirement for a hearing must be keyed to a request by the mine operators. The statute there involved provided the mine operators with no more than an "opportunity" for a hearing. "When no request for a hearing is made, the operator has in effect voluntarily defaulted and abandoned the right to a hearing and findings of fact on the factual basis of the violation and the penalty." (*id.* at 589). In the instant case the appellees had the "opportunity" also.

New York's procedure in the enforcement of the order to show cause is reasonably based. The adoption of the procedure applicable to applying civil contempt to supplementary proceedings under CPLR 5251 (1963), was explained in 6 Weinstein-Korn-Miller, *New York Civil Practice*, § 5251.02, as due to the deficiencies of the prior law (N.Y. Civil Practice Act). Cited was the "notorious disregard for court orders and process relating to the enforcement of judgments . . .", 52-745. To quote (52-746):

> "Even when the Civil Practice Act provided sanctions, they frequently were ignored in practice and the violator merely ordered to do what he initially was supposed to do, with no additional penalties being imposed. Thus, although failure to appear for an examination pursuant to a subpoena or court order was punishable as a contempt, judgment debtors learned that they could willfully flout the order of subpoena; for upon their appearance pursuant to an order to show cause, courts almost invariably required only submission to the examination."

Provisions for relief from imprisonment are provided. 9 N.Y. Jur., *Contempt*, § 66, pp. 393-394.* *It must be emphasized that appellees never sought to excuse their failure to pay the fine in the State court or claim they were unable to do so.* Therefore, so far as the record in the State court showed, the appellees were fined and failed to pay; there is no showing they could not pay. Indeed, as we have pointed out, the fines were immediately paid in all cases of imprisonment.

As the *Atlas* case (447 F. 2d at 803) shows the imprisonment is not for debt and, in fact, New York has a long standing policy against enforcing money judgments by contempt based on the belief that the use of contempt sanction under such circumstances would be tantamount to imprisonment for debt. 6 Weinstein-Korn-Miller, § 5251.03.

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* Contrary to the views of the court below (J.S. 8a., n. 2), it is not necessary to imprison the appellees before relief can be granted. *Matter of Hildreth, supra*, 28 AD 2d 290.

See also *Matter of Reeves* v. *Crownshield*, 274 N.Y. 74, 79, 8 N.E. 2d 283, 111 A.L.R. 389 (1937).

POINT III

It was not proper to grant class action relief.

In a separate memorandum, Judge MacMahon, as a single judge,* granted class action relief pursuant to Rule 23, Federal Rules of Civil Procedure (J.S. 17a). By creating a class consisting of all persons who have been, or presently are, subject to civil contempt proceeding the order went way beyond the parameters of the case before it (J.S. 20a).

Thus it covered persons represented by counsel, able to pay the fines, completely aware of the consequences of contempt, those fined to compensate the judgment-creditor in sums greatly above any punitive fine of $250. While it can be conceded all persons subject to civil contempt have an interest in not being held in contempt, it is doubtful a federal court, with any awareness of equity, federalism and comity, should entertain such base desires.

Obviously, the class covered persons such as the plaintiff in *Agur* v. *Wilson, supra* and or appellant in *Walker* v. *Walker, supra*. Yet these persons are not deprived of any constitutional rights by being held in contempt. The questions of law simply were not common to the class. Rule 23(a)(2), Fed. Rules of Civ. P.

The memorandum confused the case by lumping into the class the whole spectrum of contempt offenders without any

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* While not crucial, *Hagans* v. *Lavine*, 415 U.S. 528, 543-545 (1974), cf. n. 1 to opinion below (J.S. 10a), hardly warranted or authorized a single judge to decide the class action motion. *Hagans* simply states that if constitutional and federal statutory claims on the merits are presented, a single judge can decide the latter. The scope of the class is a function of the jurisdiction of the three-judge court.

reasonable basis. Its pervasive effect was shown by the decision of the local sheriffs not to execute any contempt fine orders in matrimonial non-support cases until the stay order was issued by Justice Marshall. *Darbonne* v. *Darbonne, supra,* 85 Misc 2d at 270 (see New York Law Journal, Jan 12, 1976, p. 1, col. 3).

POINT IV

The court below erred in granting partial summary judgment and determining the merits with a final injunction without a trial.

The procedure followed by the District Court also renders the order below erroneous. The court below granted a final judgment against the constitutionality of the several statutes in favor of appellees, without a trial. At the time this action came before the court the appellees were moving for a preliminary injunction and the appellants were moving to dismiss. The appellees made no request to the court below (by way of motion) for final or even partial summary judgment. The appellees had not answered, but only moved to dismiss (164a). The remainder of the defendants below (the Sheriff and the judgment-creditors) had answered and even submitted affidavits controverting many material "facts" or conclusions the district court relied on (79a, 82a, 148a, 156a, 160a, 162a). Yet, the district court granted a declaratory judgment and a permanent injunction, striking down numerous State statutes without a trial of the necessarily disputed issue of indigency the Court itself found material, and without any procedural safeguards such as a Federal Rules of Civil Procedure Rule 56 summary judgment motion.

The particular vice of course is that the District Court assumed as facts the allegations of the complaint and statements in affidavits as a basis for a final judgment of unconstitutionality. Thus, the district court decided that

all the appellees were indigent,* decided that every inference would be in favor of appellees and, in general, denied appellants herein their procedural rights guaranteed by the Federal Rules of Civil Procedure. In so doing the district court acted contrary to the law in its own circuit, even where there are motions for summary judgment from all parties. *Rhoads* v. *McFerran,* 517 F. 2d 66 (2d Cir. 1975).* Obviously, the question of indigency, notice, amount of fines had never been presented to the state courts, but the federal court, without a hearing, solely on affidavits and without a motion to go to final judgment decided all issues.

POINT V

The retroactive nature of the judgment is in defiance of established authorities.

The making of the judgment retroactive to all state court contempt proceedings in the state of completion was in defiance of *res judicata* and unsupportable on the record before the District Court. The final judgment swung its sword retroactively as well as prospectively. It wiped out thousands of civil contempt orders in New York without regard to the effect on the administration of justice in New York. It certainly laid out new standards for an entire body of law in New York. This was in utter contradiction of the principle of *res judicata* applicable in each of the completed contempt proceedings. There can be no

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* Our brief below showed, on appellees' own affidavits, some plaintiffs were not indigent, but simply would not accept the judgment of the state court (see also, ftn. p. 7).

* A three-judge statutory district court is bound by the law applicable in its district and circuit. *Sunshine Anthracite Coal Co.* v. *Adkins,* 31 F. Supp. 125, 127 (E.D. Ark. 1940), affd. 310 U.S. 381 (1940). On the merits, this included *Agur* v. *Wilson, supra,* which the district court ignored, despite the fact that the Circuit Judge on the panel below was on the panel in *Agur.*

doubt *res judicata* applied. *Mertes* v. *Mertes, supra,* 350 F. Supp. 472; *Godoy* v. *Gullotta, supra,* 406 F. Supp. 692.

Furthermore, even in clearly criminal cases, retroactive application of a decision must be based on certain factors: (1) purpose to be served by the new standards; (2) the extent of the reliance by public officials on the old standards; (3) effect on the administration of justice of a retroactive application of the new standards. *Daniel* v. *Louisiana,* 420 U.S. 31 (1975). Even in the exercise of proper judicial discretion, the court below could not justify giving retroactive effect to its declaration of unconstitutionality. Regardless of whether the new standards are correct* they should have only operated prospectively. What its massive effect will be if the order below is not reversed is impossible to estimate at this time.

CONCLUSION

The order below should be reversed.

Dated: New York, New York, August 4, 1976.

Respectfully submitted,

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* That the standards may be "better" is not in issue. The State courts can apply them by court rule, see 22 NYCRR § 2900.27 or decision, *Walker* v. *Walker, supra.*

Appendix—Statutes Declared Unconstitutional (Judiciary Law).

§ 756. Issue of warrant without notice

Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

§ 757. Order to show cause, or warrant to attach offender

The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either section seven hundred and fifty-five or seven hundred and fifty-six, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either

1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court at which a contested motion may be heard.

§ 770. Final order directing punishment; exception

If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defect, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or before the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly, except where an application is made under this article and in pursuance of section two hundred forty-five of the domestic relations law or any other section of law for a final order directing punishment for failure to pay alimony and/or counsel fees pursuant to an order of the court or judge in an action for divorce or separation and the husband appear and satisfy the court or a judge before whom the application may be pending that he has no means or property or income to comply with the terms of the order at the time, the court or judge may in its or his discretion deny the application to punish the husband, without prejudice to the wife's rights and without prejudice to a renewal of the application by the wife upon notice and after proof that the financial condition of the husband is changed.

§ 772. Punishment upon return of order to show cause

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process.

§ 773. Amount of fine

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

§ 774. Length of imprisonment and periodic review of proceedings

1. Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. In such case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the

offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment. If the term of imprisonment is not specified in the order, the offender shall be imprisoned for the fine imposed three months if the fine is less than five hundred dollars, and six months if the fine imposed is five hundred dollars or more. If the offender is required to serve a specified term of imprisonment, and in addition to pay a fine, he shall not be imprisoned for the nonpayment of such fine for more than three months if such fine is less than five hundred dollars or more than six months if the fine imposed is five hundred dollars or more in addition to the specified time of imprisonment.

2. In all instances where any offender shall have been imprisoned pursuant to article nineteen of the judiciary law and where the term of such imprisonment is specified to be an indeterminate period of time or for a term of more than three months, such offender, if not then discharged by law from imprisonment, shall within ninety days after the commencement of such imprisonment be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and a review of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. At periodic intervals of not more than ninety days following such review, the offender, if not then discharged by law from imprisonment, shall be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and further reviews of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. Where such imprisonment shall have

arisen out of or during the course of any action or proceeding, the clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in such action or proceeding, at their last known address.

§ 775. When court may release offender

Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.